

LAW OFFICES
KOTEEN & NAFTALIN, L.L.P.
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036-4104

BERNARD KOTEEN*
ALAN Y. NAFTALIN
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
CHARLES R. NAFTALIN
JULIE A. BARRIE
* SENIOR COUNSEL

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

November 15, 1999

DOCKET FILE COPY ORIGINAL

Hand Delivered

RECEIVED

NOV 15 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: MM Docket No. 97-122; File Nos. BRFT-970129YC, BRFT-970129YD

Dear Ms. Salas:

Transmitted herewith, on behalf of Gerard A. Turro, are an original and fourteen copies of his Reply of Gerard A. Turro to Exceptions in the above-referenced proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Charles R. Naftalin

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554
DOCKET FILE COPY ORIGINAL

In re)	
)	
GERARD A. TURRO)	MM Docket No. 97-122
)	
For Renewal of License)	File Nos. BRFT-970129YC
For FM Translator Stations)	BRFT-970129YD
W276AQ(FM), Fort Lee, NJ, and)	
W232AL(FM), Pomona, NY)	
)	
MONTICELLO MOUNTAINTOP)	
BROADCASTING, INC.)	
)	
Order to Show Cause Why the)	
Construction Permit for FM Radio)	
Station WJUX(FM), Monticello, NY,)	
Should Not Be Revoked)	

RECEIVED

NOV 15 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

To: The Commission

REPLY OF GERARD A. TURRO TO EXCEPTIONS

Alan Y. Naftalin
Charles R. Naftalin
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 467-5700

November 15, 1999

His Attorneys

No. of Copies rec'd
List ABCDE

0 + 14

SUMMARY

The Initial Decision in this proceeding is a model of clarity. It provides a thorough and highly detailed resolution of all of the issues designated against Mr. Turro and MMBI, based upon a comprehensive and exhaustive analysis of the record in plenary findings. It rests upon carefully reasoned and legally correct conclusions.

The Bureau and Universal have lodged exceptions against it. Neither of them are able to offer *any* material attack on the factual findings. Universal seeks to see Mr. Turro lose his FM translator licenses based upon the theory that the Bureau was a witless dupe which Mr. Turro succeeded in deluding by obtaining a 1991 Ruling in which the Bureau expressly authorized the programming arrangement between him and MMBI to which Universal objects. But in the Judge's words: *Turro requested from the Bureau the issuance of a declaratory ruling, Turro represented that certain "conditions would exist," Turro obtained the ruling he sought, and Turro lived up to his representations.* Even more compelling, in the Hearing Designation Order the Commission ruled that the conduct Universal complains about would not be a basis for sanction because of Mr. Turro's reasonable reliance on that 1991 Ruling. In short, Universal wastes the resources of the Commission and the parties by raising matters already decided against it, doing so through absurd extra-record speculations and attempts at mind-reading.

Similarly, Universal argues that Mr. Turro's license renewal applications should not have been granted because he has continued the programming arrangement. But Universal utterly fails to address the fact that the Bureau authorized the continuation of that arrangement, and the Commission maintained that *status quo* pending the outcome of this proceeding.

For its part, the Bureau does not challenge any of Judge Steinberg's conclusions in favor of Mr. Turro concerning his character, operations or renewal of licenses.

The Bureau argues that the Judge erred in finding that there was no illegal transfer of control of MMBI's station, WJUX. In doing so, the Bureau essentially concedes the correctness of the Judge's detailed findings that MMBI held full control of WJUX finances, personnel and essential aspects of programming (and that Mr. Turro did not), instead suggesting that "the big picture" establishes that there was an illegal transfer of control. This urges the counter-precedent that the sum of the parts is less than the whole. Building on that dubious notion, the Bureau also contends that Mr. Turro and MMBI lacked candor because they did not reveal the legal conclusion that an unlawful transfer of control had taken place. In so arguing, the Bureau ignores the fact that both parties acted in reasonable reliance on the 1991 Ruling and that they were fully forthcoming with all material facts, including copies of the agreement between them, on every occasion.

The record underpinning the Initial Decision is unchallenged in any credible way. It should be affirmed promptly in a final decision.

TABLE OF CONTENTS

	<u>Page</u>
Summary	i
I. Introduction and Background	2
II. The Record Is Conclusive That Mr. Turro Was Candid And Did Not Misrepresent Material Facts	3
III. The Continuation Of The Programming Arrangement Has Been Permitted By The Commission And Therefore Cannot Be The Basis For License Revocation	10
IV. Mr. Turro Exercised No Control Over WJUX.	14
A. Financial responsibility	15
B. Control of personnel	16
C. Responsibility for FCC requirements	16
V. Universal's Various Scattergun Assertions Are Unavailing	18
VI. Conclusion	20
Attachment No. 1	
Attachment No. 2	
Attachment No. 3	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Initial Decision of Administrative Law Judge Arthur I. Steinberg, FCC 99D-03</u> (released August 16, 1999)	1
<u>Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing,</u> 12 FCC Rcd 6264 (1997)	2
<u>Wigmore On Evidence</u> Sec. 272 (1984)	8
<u>Washoe Shoshone Broadcasting</u> , 3 FCC Rcd 3948, 3953 (Rev. Bd.), <u>recon. denied</u> , 3 FCC Rcd 5631 (Rev. Bd. 1988)	8
<u>Joseph A. Belisle, Esq.</u> , 5 FCC Rcd 7585 (MMB 1990)	9,15
<u>Roy R. Russo, Esq.</u> , 5 FCC Rcd 7586 (MMB 1990)	9,15
<u>J. Dominic Monahan, Esq.</u> , 6 FCC Rcd 1867 (MMB 1991)	9,15
<u>Pere D. O'Connell, Esq.</u> , 6 FCC Rcd 1869 (MMB 1991)	9,15
<u>Brian M. Madden, Esq.</u> , 6 FCC Rcd 1971 (MMB 1991)	9,15
<u>Gisela Huberman, Esq.</u> , 6 FCC Rcd 5397 (MMB 1991)	9,15
<u>Joseph F. Bryant</u> , 6 FCC Rcd 6121 (MMB 1991)	9
<u>TeleSTAR, Inc.</u> , 2 FCC Rcd. 5, 17 (Rev. Bd. 1987)	9
<u>Opal Chadwell</u> , 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987)	9
<u>WEBR, Inc. v. FCC</u> , 420 F.2d 158, 162 (D.C. Cir. 1969)	10
<u>Broadcast Associates of Colorado</u> , 104 FCC 2d 16, 19 (1986)	10
<u>Signal Ministries, Inc.</u> , 104 FCC 2d 1481, 1486 (Rev. Bd. 1986)	10
<u>Memorandum Opinion and Order</u> , DA 96-1292 (August 13, 1996)	11
<u>Reuters, Ltd. v. FCC</u> , 781 F.2d 946, 951 (DC Cir. 1986)	14
<u>Orange Park Florida T.V., Inc. v. FCC</u> , 811 F.2d 664, 674 (DC Cir. 1987)	14
<u>Order</u> , FCC 99I-17 (released October 4, 1999)	20

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re)	
)	
GERARD A. TURRO)	MM Docket No. 97-122
)	
For Renewal of License)	File Nos. BRFT-970129YC
For FM Translator Stations)	BRFT-970129YD
W276AQ(FM), Fort Lee, NJ, and)	
W232AL(FM), Pomona, NY)	
)	
MONTICELLO MOUNTAINTOP)	
BROADCASTING, INC.)	
)	
Order to Show Cause Why the)	
Construction Permit for FM Radio)	
Station WJUX(FM), Monticello, NY,)	
Should Not Be Revoked)	
To: The Commission		

REPLY OF GERARD A. TURRO TO EXCEPTIONS

Gerard A. Turro, by his attorneys, hereby submits his Reply to the Mass Media Bureau's ("Bureau") Exceptions to Initial Decision¹ and to the Exceptions to Initial Decision of Universal Broadcasting of New York, Inc. ("Universal"), both dated October 20, 1999. The Bureau challenges Judge Steinberg's conclusion that there was no impermissible transfer of control of WJUX(FM), Monticello, New York. Universal raises a similar claim, also contends that the Judge erred in finding that Mr. Turro was candid with the Commission at all times and did not misrepresent relevant facts, and that the licensee of WJUX² did not maintain a lawful main

¹Initial Decision of Administrative Law Judge Arthur I. Steinberg, FCC 99D-03 (released August 16, 1999) ("ID").

²Monticello Mountaintop Broadcasting, Inc. ("MMBI"), which is solely owned by Wesley Weis. Mr. Turro relies on MMBI for a thorough discussion of the transfer of control and main studio issues relating to WJUX.

studio. The ID should be affirmed in its entirety.

The Exceptions in this proceeding are unusual in that neither the Bureau nor Universal attacks Judge Steinberg's findings of fact in any material way.³ Consequently, we cite the ID extensively because it correctly characterizes the record and the evidence it relies upon has not been seriously questioned by the parties. We incorporate the ID record cites by reference.

In addition, Universal urges that Mr. Turro's licenses should not have been renewed because of alleged character issues arising from Mr. Turro's programming arrangement with WJUX. As we demonstrate, virtually all of what Universal alleges in this regard is irrelevant to this proceeding, because the Hearing Designation Order⁴ expressly excluded that conduct from the designated issues. Certainly, the Bureau does not raise these matters.

The transfer of control allegations of the Bureau and Universal rest almost entirely upon the simplistic notion that if Mr. Turro brokered all, or almost all of the programming of WJUX, then he necessarily controlled the station. This is clearly incorrect. As shown herein, the Judge correctly ruled that such programming arrangements have been authorized by the Commission for many years, and the parties have not controverted that ruling.

I. Introduction And Background

Mr. Turro is the licensee of the captioned FM translators serving Fort Lee, New Jersey and Pomona, New York, and is the principal of a network programming service called "Jukebox Radio." The translators rebroadcast the signal of WJUX, which carries Jukebox Radio. Review

³Universal attempts a few scattered minor factual challenges, buried in footnotes and without serious or accurate use of the record, which we address.

⁴Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, 12 FCC Rcd 6264 (1997) ("HDO").

of the actual record and history demonstrates that the ID should be affirmed because:

- By letter of January 30, 1991, Mr. Turro asked the Bureau if a translator licensee could be allowed to be a programming broker to a full power FM station whose signal the translator rebroadcasts. (A copy is Attachment No. 1 hereto.)
- In a Ruling dated November 19, 1991, the Chief of the Bureau correctly authorized the programming arrangement proposed by Mr. Turro. (A copy is Attachment No. 2 hereto.)
- Acting in accordance with the Bureau's Ruling, in 1994 Mr. Turro established the relationship with WJUX to which Universal objects. On April 5, 1996, however, the Bureau responded to Universal complaints, reversed itself, and held that Mr. Turro could not continue both to provide programming to WJUX and to own the translators. The Bureau directed Mr. Turro to submit a proposal within 60 days for compliance with the Bureau's new ruling. Meanwhile, the Bureau permitted Mr. Turro to continue the programming arrangement. (A copy of that permission is Attachment No. 3 hereto.)
- Rather than challenging the Bureau's reversal, for which he had good grounds, Mr. Turro within the specified 60 days submitted a proposal to assign his translator stations to a trust, and the Bureau authorized him to continue the programming arrangement while it considered his application to accomplish the divestiture. Subsequently, the Bureau expressed its dissatisfaction with the trust proposal and asked Mr. Turro to make a new proposal for compliance within ten days. Mr. Turro responded with a proposal to sell the stations and then filed an application to assign the translator stations to a third party.
- The Bureau did not act on the assignment application, which Universal opposed, and in 1997 the Commission designated the translator stations' renewal applications for a hearing, holding the assignment application in abeyance. The Commission, well aware of the situation, held the assignment application in abeyance, clearly including the continuation of the programming arrangement, pending the outcome of the hearing. In the HDO, the Commission decided that it would not pursue any violation of Section 74.1232 because Mr. Turro's reliance on the 1991 Ruling was reasonable.
- The hearing established conclusively that Universal's passel of allegations were trumped up nonsense, including that at all times Mr. Turro acted openly and candidly in his representations to the Commission, and specifically in obtaining the 1991 Ruling, that he never had a financial interest in MMBI, never was a party to any of its obligations or directed the activities of any of its personnel.

II. The Record Is Conclusive That Mr. Turro Was Candid And Did Not Misrepresent Material Facts

At the outset, it is clear that in the HDO the Commission understood that Mr. Turro obtained the 1991 Ruling, and relying upon it, made programming available to WJUX on a full

time basis, while retransmitting its signal on his translators. The Commission affirmatively decided not to designate any issues against Mr. Turro based on this conduct, including candor issues. Thus, while we address the substance of Universal's allegations, the Commission should deny them as irrelevant and outside of this proceeding as previously decided.

Other than in connection with the transfer of control issue, the Bureau does not challenge Judge Steinberg's conclusions that Mr. Turro was candid, did not misrepresent material facts and has the requisite character qualifications to remain a Commission licensee. Universal's position that Mr. Turro lacked candor and misrepresented facts to the Commission in connection with his translator operations is without merit. Universal's allegations concerning the Bureau's 1991 Ruling rest upon serious mistakes and misstatements of the record and fail to address the actual findings and conclusions of the ID.

The fundamental conclusion which Universal ignores is:

The Bureau and Universal maintain that Turro had a motive for misrepresenting to the Commission his arrangement with MMBI. In this regard, they note that Turro was twice rebuffed by the Commission when he attempted to obtain a ruling permitting translator stations to be used to originate local programming. They also claim that the arrangement with MMBI was a "scheme" to deceive the Commission and to circumvent and evade those rulings as well as the Commission's translator rules and policies. These assertions are without merit. The record reflects that Turro did not circumvent the Commission or its rules. On the contrary, *Turro requested from the Bureau the issuance of a declaratory ruling, Turro represented that certain "conditions would exist," Turro obtained the ruling he sought, and Turro lived up to his representations.* Specifically, Turro stated that the licensee of the translator would purchase air time on the primary station, and it did. Turro stated that the translator would be operating outside of the originating station's primary contour, and it did. Turro stated that the primary station would not reimburse the translator licensee for air time, and it did not. Turro stated that the primary station would not financially support the translator licensee, and it did not. Turro stated that the translator licensee would abide by the Commission's time brokerage rules in connection with any air time that it purchased on the primary station, and it did. And, finally, Turro stated that the translator licensee may sell advertising to support its programming, and it did. Moreover, the Bureau must be presumed to have known of Turro's unsuccessful attempts to persuade the Commission to allow translators to originate programming inasmuch as the Bureau itself issued one of the rulings and the others were published. Yet

the Bureau gave Turro the declaratory ruling he had requested, although it was under no obligation to do so. Under these circumstances, Turro cannot be faulted for relying on the Bureau Letter in his operation of the Fort Lee translator. See HDO at note 13 (Turro's contention that the Bureau Letter authorized his arrangement with MMBI was "not unreasonable"). (ID, para 299, emphasis added)

Universal's Exceptions do not address this conclusion or the findings and record behind it. Universal relies entirely upon invective and rearguing its prehearing allegations without challenge to the record itself, as if the hearing had not even taken place. The three Attachments hereto are simple and clear, demonstrating that Mr. Turro was candid. Universal does not deal with them, and instead offers extra-record mind-reading speculations into what "Turro knew" (Universal Exceptions, p. 2) and what "Turro intended" (Id., p. 6) without mentioning that Mr. Turro's actual testimony was that he did not deceive the Commission. The actual circumstances were as follows.

By letter of January 30, 1991 (Attachment No. 1, Bureau Ex. 1), Mr. Turro asked if a translator licensee permissibly could be a program broker to a full power FM station which the translator rebroadcast. Attachment No. 1 makes it clear that he provided all material facts.

Mr. Turro sought such a declaratory ruling because Section 74.1232 of the Commission's Rules prohibited commercial FM stations from extending their signals beyond their authorized service contours through ownership of translators or through financial support to translators. What that Rule did not make clear was if the reverse was permissible, *i.e.* whether a translator licensee could help support an FM station financially by purchasing brokered time on the station, and then retransmitting the brokered signal.

The subsequent 1991 Ruling (Attachment No. 2, Bureau Ex. 1) expressly authorized Mr. Turro to broker time on an FM station and then retransmit the signal of that station on his translators, subject to several conditions designed to make sure that the brokerage arrangement

was *bona fide* and that nothing of value flowed from the primary station to the translator(s):

[T]he issue presented by Mr. Turro's request is whether the licensee of a translator station is permitted to enter into a time brokerage contractual arrangement with its primary station, provided that the primary station does not either reimburse the translator station licensee for the purchase of the brokered time or provide financial support for the translator's operations.

....

Under §74.1232(e), an FM translator station whose coverage contour extends beyond the protected contour of the primary station cannot receive financial support, before or after construction, either directly or indirectly, from the primary station. This applies to all persons and entities having any interest or connection with the primary station.

With regard to brokerage arrangements between licensees and brokers, such arrangements usually involve the broker as both program producer and commercial salesperson for a time block purchased from the licensee. Our rules only require licensees to keep brokerage contracts at the station and make them available for Commission inspection upon request. (47 C.F.R. §73.3613(d) (1989)).

In view of the specific circumstances presented by Mr. Turro's request, **we conclude that his proposed operation would be consistent with the Commission's rules and policies as outlined above.** However, this conclusion rests on the following requirements: the time brokerage contract must be kept at the primary station and made available for Commission inspection upon request per §73.3613(d); there must be a bona fide, arm[']s-length transaction between the primary station and the translator; the licensee of the translator station will have to pay the primary station a rate charge comparable to the amount charged other purchasers of brokered airtime, or an amount consistent with such charges in the local broadcast community; and at no time would the translator station receive financial support, directly or indirectly, from the primary station to cover any costs associated with the operation and maintenance of the translator station.⁵

Universal offers the absurd suggestion that there was no possible "uncertainty" about Section 74.1232 so that Mr. Turro's 1991 declaratory ruling request could only have been an attempt to deceive. (Universal Exceptions, pp. 6, 13) This is another extra-record exercise in clairvoyance. However, we submit that the Bureau's 1991 Decision entirely refutes Universal's suggestion that there could have been no "uncertainty." If there had been no uncertainty, then the Bureau would have declined the request. It is simply incredible that the Bureau could have

⁵ Attachment No. 2. (Emphasis added); see also ID, para. 13.

been the brainless “dupe” Universal suggests. (Universal Exceptions, p. 13) As the quote above makes clear, the Bureau undoubtedly allowed Mr. Turro to broker time on an FM station and then retransmit that programming on his translators. The Commission’s subsequent determination (HDO, 6269 note 13) that Mr. Turro reasonably relied on the 1991 Ruling also eviscerates Universal’s argument, as does the ID. Thus, seeking a declaration was warranted and should not be the basis now for administrative sanction.⁶

Reasonably relying on the 1991 Ruling (HDO, 6269 note 13), in 1994 Mr. Turro entered into an arrangement with station WJUX, in compliance with the Bureau’s directions.⁷ However, after extensive *ex parte* lobbying of the Bureau by Universal, and its submission of a secret complaint, the Bureau rescinded its 1991 Ruling in an April 5, 1996 decision. It was alleged that Mr. Turro had violated Sections 74.531(c) and 74.1231(b) of the Commission’s Rules by relaying signals of WJUX to the translators through means other than off-air reception. (See HDO, 6266-6267; 6269) The ID proves that these allegations were entirely untrue. (ID, paras. 126-129, 138-149, 150-154, 175-177, 181-190, 265-291) Those findings have not been challenged at all by the Bureau, and only in passing in a brief footnote by Universal, which we address toward the end of this Reply.

In its April 5, 1996 decision, which reversed the 1991 Ruling, the Bureau stated that it had not “anticipated” the business arrangement between Mr. Turro and MMBI, believing that Mr. Turro’s connection to WJUX would be “*de minimis*” and not “ongoing and substantial.”

⁶The First Amendment to the Constitution of the United States of America reserves the right to petition the government.

⁷The document establishing the relationship between Mr. Turro and WJUX was called a “network affiliation agreement,” but in pertinent part its terms were entirely consistent with a brokerage agreement, observing the dictates of the Bureau’s 1991 Ruling.

However, even a cursory reading of Attachment Nos. 1 and 2 makes it clear that the April 5, 1996 reversal decision was erroneous. Most certainly, Mr. Turro did not mislead the Bureau at all. (See ID, para. 299) And in any event, discussions of what might be considered “*de minimis*” and/or “ongoing and substantial” also establish that there was reasonable uncertainty about Section 74.1232 of the Rules under these circumstances.

There is no actual evidence to support Universal’s dubious proposition that the Bureau was confused (or misled) about anything in connection with the 1991 Ruling. Neither the Bureau nor Universal offered or attempted to call a witness, or provide any other sworn testimony, subject to cross examination, to establish that the Bureau was misled.⁸ The 1996 reversal may be a statement of the Bureau’s revised interpretation of Section 74.1232 of the Rules, but it is not evidence of the Bureau’s state of mind, which would be essential for Universal to prove that a “deception” of the Bureau took place. Without record evidence that the Bureau was, in fact, “deceived,” Universal literally cannot prove its misrepresentation claims against Mr. Turro. Universal has proven nothing, and the Bureau itself has not even claimed to have been deceived, in its Exceptions or anywhere else.

Mr. Turro did exactly what he had asked about and the Bureau authorized. He brokered programming on a primary station and rebroadcast it on his translators. Judge Steinberg correctly held that the Bureau’s own contemporary precedent made it clear that Mr. Turro correctly used the term “brokerage,” and that in 1991 the Bureau understood what the

⁸See Wigmore On Evidence Sec. 272 (1984)(espousing the “classic” statement of the law to be that “if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it created the presumption that the testimony, if produced, would be unfavorable”), quoted in Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev. Bd.), recon. denied, 3 FCC Rcd 5631 (Rev. Bd. 1988).

arrangement would be. (See ID, para. 295) The Judge established through several contemporary decisions that the 1991 use of the term “brokerage” by Mr. Turro and the Bureau contemplated substantial (not *de minimis*) amounts of programming, including up to 24 hours a day.⁹ The Bureau has not challenged this view. (See e.g. Bureau Exceptions, p. 5 note 2) In this regard the Judge held, and Universal has not refuted, that:

The Bureau and/or Universal argue that Turro lacked candor in his January 30, 1991, request for a declaratory ruling by failing to disclose that his intentions were to provide 100 percent of the primary station's programming, to be the only purchaser of brokered air time on the primary station, and to have the translator station sell all of the commercial advertising during the brokered air time. These contentions must be rejected. First, the record does not show that Turro intended to deceive the Commission even assuming, arguendo, that he omitted any material information.¹⁰ Second, a review of contemporary case precedent establishes that, even if Turro had disclosed the above details to the Bureau in his request for a declaratory ruling, the Bureau's ruling would not have been substantially different. (ID, para. 295)

Therefore, Universal's various contentions that Mr. Turro “deceived” the Bureau are baseless. The record on this matter entirely vindicates Mr. Turro and Universal has not identified a single material fact to the contrary. Significantly, the Bureau (the most interested party) does not challenge these determinations about Mr. Turro's character.¹¹

⁹ID, para 295, relying on: Joseph A. Belisle, Esq., 5 FCC Rcd 7585 (MMB 1990); Roy R. Russo, Esq., 5 FCC Rcd 7586 (MMB 1990); J. Dominic Monahan, Esq., 6 FCC Rcd 1867 (MMB 1991); Pere D. O'Connell, Esq., 6 FCC Rcd 1869 (MMB 1991); Brian M. Madden, Esq., 6 FCC Rcd 1971 (MMB 1991); Gisela Huberman, Esq., 6 FCC Rcd 5397 (MMB 1991); Joseph F. Bryant, 6 FCC Rcd 6121 (MMB 1991). Universal has not disputed the holdings in these decisions, including the one issued to its own counsel.

¹⁰Universal fails to disclose that Mr. Turro expressly testified that he never intended to deceive the Commission or to hide any important facts. Tr. 2112.

¹¹The law requires that credibility findings of an ALJ be given considerable deference, unless those findings are in irreconcilable conflict with the other record evidence. TeleSTAR, Inc., 2 FCC Rcd. 5, 17 (Rev. Bd. 1987) (Subsequent history omitted); see also Opal Chadwell, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987) (credibility findings of ALJ generally control, absent “countervailing record evidence” demonstrating “reversible error in that ALJ's credibility

III. The Continuation Of The Programming Arrangement Has Been Permitted By The Commission And Therefore Cannot Be The Basis For License Revocation

Universal offers the unwarranted assertion that the continuation of the programming arrangement between Mr. Turro and MMBI constitutes a violation of Section 74.1232 of the Commission's Rules sufficient to have required the Judge to deny license renewals to Mr. Turro. (Universal Exceptions, pp. 2-3, 10-11) Universal ignores the fact that the Bureau permitted continuation of this programming arrangement and subsequently the Commission held that any violation of this Rule would not be pursued because of Mr. Turro's reasonable reliance on the 1991 Ruling.

As demonstrated above, Mr. Turro candidly sought, and the Bureau correctly authorized, the arrangement by which Mr. Turro eventually brokered time on WJUX and retransmitted the WJUX signal on his Fort Lee and Pomona translators. After extensive behind the scenes efforts by Universal, the Bureau reversed that decision in 1996, expressing its concern about the combination of the translator licensee being a program provider to the primary FM station being rebroadcast. There never was doubt that Mr. Turro could broker programming on WJUX lawfully if he did not own translators, or that he could continue to own translators and have them carry the WJUX signal if he stopped providing programming to WJUX. To address the concern about the programming–retransmission combination, the Bureau directed Mr. Turro to propose

determination.” quoting WEBR, Inc. v. FCC, 420 F.2d 158, 162 (D.C. Cir. 1969) (subsequent history omitted)); Broadcast Associates of Colorado, 104 FCC 2d 16, 19 (1986) (“absent extrinsic evidence to the contrary, we believe that the ALJ's judgment . . . is entitled to great weight”) (modifying 100 FCC 2d 616 (Rev. Bd. 1985)); Signal Ministries, Inc., 104 FCC 2d 1481, 1486 (Rev. Bd. 1986) (absent “patent conflicts with the record evidence, the Commission accords special deference to [an ALJ's] credibility findings since the trier of fact has had a superior opportunity to observe and evaluate a witness's demeanor and to judge his/her credibility”).

how he intended to come into compliance with the Bureau's revised understanding, effectively giving him the choice of ending the programming arrangement with MMBI or divesting himself the translator stations. The Bureau afforded Mr. Turro

...60 calendar days...to sever and/or discontinue any and all prohibited interests, connections, contracts, relationships, agreements, and activities, and to take whatever further action is necessary in order to comply fully with all of the provisions of §74.1232 of the Commission's Rules. You are also hereby requested to notify the undersigned in writing by the expiration of the 60 day grace period of the steps that you have taken in response to this letter and to certify therein that you comply fully with all of the provisions of §74.1232 of the Commission's Rules. (April 5, 1996 decision at 3).

Rather than challenge the Bureau's order, for which there were good grounds, Mr. Turro sought to come into compliance by ceasing his ownership of the two translators, thus ending the combination which troubled the Bureau. By application filed with the Commission on May 31, 1996, within the 60 day grace period, Mr. Turro proposed to assign the two translator licenses to a trust.¹² By letter dated June 5, 1996, the Bureau expressly authorized Mr. Turro to continue the programming arrangement while the assignment application was under consideration.¹³

Universal petitioned to deny the assignment, and the Bureau found the assignment of the translators to the trust unacceptable and directed Mr. Turro to advise the Bureau within ten days as to his plans to come into compliance with the April 5, 1996 decision. Memorandum Opinion and Order, DA 96-1292 (August 13, 1996). By letter dated August 23, 1996, Mr. Turro informed the Commission that he had entered into a binding letter of intent with Press Broadcasting, Inc. ("Press") for an unconditional sale of the two translators, and furnished a copy of that letter of

¹²See File Nos. BALFT-960531TW and BALFT-960531TX.

¹³Letter of Roy J. Stewart, Chief, Mass Media Bureau, dated June 5, 1996 (Ref. No. 96060058, 8210-AA), a copy of which is Attachment No. 3 hereto. See also HDO, 6269. Universal's counsel was sent a copy of this letter.

intent. He promised to file an assignment of license application to that effect by September 6, 1996, which he did.

Again, Universal petitioned to deny the application. Rather than granting the application to assign the translator licenses to Press, thereby permitting Mr. Turro to come into compliance by ceasing all ownership of the translators, the Bureau took no action on the application. Eventually, on April 18, 1997, the Commission released the HDO, which ordered that processing of the assignment application be held in abeyance pending the outcome of the instant proceeding. (HDO, 6273). There the situation remains.

The Commission stated in the HDO that Mr. Turro's reliance on the 1991 Ruling was "not unreasonable," and on that basis decided that the Commission would not pursue a violation of Section 74.1232 of the Commission's Rules.¹⁴ Universal's desire to destroy Mr. Turro's current livelihood and future in broadcasting by having his license renewal applications denied would be one of the ultimate punishments possible in "pursuit" of any violation of the Commission's Rules. Such action was considered by the Commission and rejected in the HDO. Subsequently, Judge Steinberg's vindication of Mr. Turro in the ID supports that decision, that

¹⁴"Since Section 74.1232(d) of the Commission's Rules prohibits Turro from having "any interest whatsoever, or any connection with" WJUX beyond rebroadcasting WJUX's off-air programming over his translator stations, and Turro is a party to a Network Affiliation Agreement which establishes for him a further business relationship with WJUX, the Bureau, in its April 5, 1996, letter, concluded, and we explicitly affirm, that these relationships violate Section 74.1232(d) of the Rules. With respect to this violation, however, we acknowledge that the Bureau issued Turro a letter in 1991 which he may have construed to authorize his relationship with WJUX and MMBI. See paragraph 5, *supra*. We agree with the Bureau that the 1991 letter was not so broad as to authorize what is now known to be the relationship between WJUX and the translators. We find Turro's contention to the contrary, however, is not unreasonable. *Accordingly, we will not pursue in this proceeding any violation of Section 74.1232(d) that may have resulted from Turro's reliance on the 1991 letter.*" HDO, 6269, note 13. (Emphasis added)

punitive action against Mr. Turro due to the programming arrangement is not warranted.

Accordingly, Universal's argument concerning Section 74.1232 of the Commission's Rules is outside the scope of exceptions to the ID.¹⁵ As shown above, the Commission's decision to exclude consideration of Section 74.1232(d) of the Commission's Rules from the proceeding was a good one in light of the actual history of the matter, which is substantially different from the misreading urged by Universal.

In determining that Mr. Turro's reliance on the 1991 Ruling was reasonable and in excluding consideration of the possible violation of Section 74.1232 from this proceeding (HDO, 6269 note 13), the Commission knew of the 1991 Ruling and the 1996 reversal of it, and that Mr. Turro had been brokering most or all of the time of WJUX. The Commission necessarily decided that full time or partial time brokerage of WJUX was not material.

The Commission chose to hold Mr. Turro's application in abeyance, the grant of which would have cleared the way for him to come into compliance with the Bureau's revised understanding of Section 74.1232 of the Rules. The programming arrangement remains in place because the Bureau authorized its continuation and the Commission sustained it. Universal's demands for punitive action against Mr. Turro through loss of his licenses cannot prevail because Mr. Turro's timely efforts to comply have been delayed by the Commission's own procedural actions.¹⁶

¹⁵Universal's various scurrilous attacks on Mr. Turro's character are baseless. Because Section 74.1232 was not an issue in the hearing (and Universal did not even seek to make it an issue through enlargement or otherwise), there is *no evidence* adduced in the hearing record to support Universal's allegations. Universal's burden of proof has not been met, indeed, it has not even been addressed.

¹⁶Contrary to Universal's contentions, the Commission had the discretion to permit Mr. Turro to come into compliance with the Bureau's revised understanding of Section 74.1232 and

IV. Mr. Turro Exercised No Control Over WJUX.¹⁷

The only aspect of the ID challenged by the Bureau is Judge Steinberg's determination that there was no transfer of control of WJUX. Universal, too, argues that Mr. Turro was in illegal control of the station.

The Bureau and Universal are incorrect. The hearing record establishes clearly that MMBI was in control of WJUX finances, personnel, and operations, including the retention of essential aspects of control of its programming obligations. In addition, MMBI was legally responsible for the operations of WJUX. As shown below, the Judge properly concluded that there was no transfer of control.

The Bureau and Universal essentially contend that because Mr. Turro brokered all or almost all of the programming of WJUX he necessarily controlled the station. As shown in the following section, the actual facts demonstrate the contrary. But in any event, the Judge correctly determined that long-standing Commission precedent permits time brokerage of up to

to continue the programming arrangement during the pendency of proceedings. In this case, the Bureau actually reversed its 1991 Ruling (based largely upon Universal's secret complaint, now fully repudiated in the ID), upon which Mr. Turro reasonably relied. It was equitable to allow him his choice of compliance, sale of translators or termination of programming/retransmission. Universal cites Reuters, Ltd. v. FCC, 781 F.2d 946, 951 (DC Cir. 1986) for the proposition that the Commission has no such discretion and must enforce its "rules" without regard to circumstances. (See Universal's Consolidated Reply, dated November 8, 1999, p. 3) However, that case considered the Commission's application processing Rules, and not the complex and uncertain situation of Mr. Turro in this proceeding. Indeed, the DC Circuit later held that "*Reuters* did not hold ... that an agency may never grant exceptions to its rules. Indeed, we could not have held so broadly without upsetting precedent recognizing '[a]ny rule of general applicability will involve particular cases of hardship, for which an agency would be empowered to make individual dispensations.'" Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664, 674 (DC Cir. 1987) (citations omitted).

¹⁷Because the transfer of control is of primary concern to MMBI, we rely on MMBI's Reply and here confine our discussion to exceptions concerning Mr. Turro's conduct. We repeat that citations to the ID incorporate references to the record.

24 hours a day without penalty.¹⁸ That line of analysis is unchallenged.

A. Financial responsibility

MMBI held exclusive financial control over WJUX. Mr. Turro held none. MMBI acquired the construction permit by paying \$40 thousand cash and by being the sole maker and sole obligated party of a Secured Note. (ID, para. 35) Mr. Weis personally guaranteed obligations and signed MMBI checks himself. (ID, para. 46) There was no financial connection at all between Mr. Turro and the seller of the permit, Mr. Fishman.

The cash payment came from MMBI's account, not from Mr. Turro. (ID, para. 35) The Bureau and Universal argue that MMBI's reliance on its business relationship with Mr. Turro, including his initial cash payment and agreement to pay monthly brokerage fees automatically transferred financial control from MMBI to Mr. Turro. Obviously, this was not the case. There were no "strings" on the payments of funds from Mr. Turro to MMBI and Mr. Turro was not in privity with any of the commitments MMBI made:

- MMBI alone assumed the transmission tower lease and Mr. Fishman's prior guaranty of it. (ID, para. 36)
- MMBI alone entered into a lease for studio and office space for its main studio. (ID, para. 37)
- Mr. Weis ordered all equipment and his employees constructed the station. (ID, para. 41)
- MMBI paid all costs of construction. (ID, para. 46)
- MMBI made all payments to Mr. Fishman. (Ibid.)

¹⁸ID, para 295, relying on: Joseph A. Belisle, Esq., 5 FCC Rcd 7585 (MMB 1990); Roy R. Russo, Esq., 5 FCC Rcd 7586 (MMB 1990); J. Dominic Monahan, Esq., 6 FCC Rcd 1867 (MMB 1991); Pere D. O'Connell, Esq., 6 FCC Rcd 1869 (MMB 1991); Brian M. Madden, Esq., 6 FCC Rcd 1971 (MMB 1991); Gisela Huberman, Esq., 6 FCC Rcd 5397 (MMB 1991); Joseph F. Bryant, 6 FCC Rcd 6121 (MMB 1991).

- MMBI made all lease payments for the transmitter site and main studio. (Ibid.)
- MMBI alone compensated its employees. (Ibid.)
- MMBI alone paid for services, products and utilities for WJUX.¹⁹ (Ibid.)
- Although MMBI could sue Mr. Turro if he breached the network affiliation agreement, MMBI would remain liable for all of its obligations without regard to any commitments or failures by Mr. Turro. (ID, para. 47)

Thus, Universal's allegation that Mr. Turro "assum[ed] all of the risk of operating WJUX" (Universal Exceptions, p. 7) is entirely contrary to the record.

While it is undisputed that MMBI depended upon Mr. Turro for most or all of its income, at least initially, Mr. Weis and MMBI were solely responsible for all of WJUX's financial obligations and arrangements. Mr. Turro exercised no control whatsoever.

B. Control of personnel

Similarly, MMBI controlled all personnel of WJUX. Mr. Weis personally hired Mr. Blabey to act as the station's general manager and Ms. Montana to work under Mr. Blabey on the WJUX staff. Mr. Weis also hired engineering personnel, first Mr. Spicka and later Mr. Kirschner. They were employed by MMBI, not Mr. Turro, and answered to Mr. Weis. (ID, paras. 49-53)

C. Responsibility for FCC requirements

MMBI was legally responsible to the Commission for the operations of WJUX. Universal suggests that an indemnification provision transferred such responsibility from MMBI to Mr. Turro. (Universal Exception, p. 20) Universal is wrong and the ID proves it. The record is clear that Mr. Turro indemnified MMBI only in the event that the network programming he provided led to an FCC forfeiture against WJUX. The testimony of Mr. Turro and Mr. Weis is

¹⁹The only exception was a short period of time for telephone bills.

unchallenged that if WJUX was assessed a fine for some matter other than network programming, then it would be MMBI's responsibility.²⁰ In short, Mr. Turro was responsible for the Network and MMBI was responsible for WJUX.

The Bureau and Universal argue extensively that Mr. Turro "controlled" WJUX because his network provided virtually all of the programming. This is incorrect. At all times MMBI maintained the right to ensure that the needs of its listeners in the Monticello area were met with programming addressing matters of public importance to them. (ID, para 32-33) Specifically, MMBI had the right to ascertain the needs of the Monticello area listeners, the right to broadcast non-network programming and the right to delete or preempt network programming in order to broadcast programming responsive to the needs of its community of license listeners. (ID, para. 32) Indeed, MMBI had the right to preempt or delete network programming it considered unsatisfactory, unsuitable or contrary to the public interest. (*Ibid.*) Therefore, essential public interest obligations concerning programming rested with MMBI and not Mr. Turro.²¹

MMBI regularly exercised its programming rights. Mr. Weis made arrangements with Mr. Blabey to have locally produced public affairs and public service programming aired on WJUX. (ID, para. 55) Ms. Montana was responsible for gathering material for compiling a

²⁰ ID, para. 30 "Turro stated the indemnification was limited to programming and neither Turro nor the Network would be responsible if MMBI was assessed a fine, for example, for operating the transmitter above its authorized power."

²¹The Bureau and Universal suggest that MMBI did not retain rights to control public interest programming at the beginning of the arrangement and only acquired such rights after initiation of an investigation by the Commission through July 17, 1995 amendment to their network affiliation agreement. (Bureau Exceptions, p 10; Universal Exception, p. 21) They are incorrect. Undisputed testimony established that the "amendment" was retroactive to the original October 1994 agreement, that it did not change the understanding of the parties, and that MMBI did not change its role in station operations because of it. (ID, paras. 32-34)

bulletin board of local public service announcements and forwarding them for inclusion in the network's programming, which were aired on WJUX "on almost every occasion." (ID, para. 59) Mr. Blabey made decisions about putting local emergency announcements on WJUX, for example the airing of local road closure announcements due to a snow storm in the Monticello vicinity. (ID, para. 61) Therefore, the record clearly established that MMBI retained substantial control over essential public interest programming, and that it exercised that control regularly.²²

Finally, the Bureau argues circularly that if there were an illegal transfer of control from MMBI to Mr. Turro, and the parties did not so inform the Commission, then they lacked candor and misrepresented material facts. (Bureau Exceptions, pp. 17-19) As shown above, no such transfer took place. The Bureau essentially admits that the individual circumstances of the case establish that control of WJUX remained with MMBI but "the big picture" suggests the contrary. (Bureau Exceptions, p. 4) Beside being untenable the record is clear that the parties informed the Commission of the facts at every occasion, including in the provision of the programming agreement to the field engineer and in responding to all Commission inquiries. (ID, paras. 16, 199) Even if the Commission reached a different legal conclusion from Judge Steinberg, which would be unwarranted, the parties were candid.

V. Universal's Various Scattergun Assertions Are Unavailing.

Part and parcel with the fact that Universal offers virtually no challenge to the facts found in the ID, it makes several unsupported assertions which are not directly related to its primary arguments. We address them briefly here.

²²The Commission also should consider the destabilizing effect on the radio broadcasting industry, where substantial time brokerage is commonplace, if it reverses the ID and finds a transfer of control occurred under the circumstances presented here.

Universal claims that Mr. Turro had “compelling” business reasons to enter into the programming arrangement with MMBI because it would “prove very profitable.” (Universal Exceptions, pp. 4-5, 13) Mr. Turro did not testify that he pursued the programming arrangement due to a lust for profits. (See ID, para. 8) In addition, there is no record as to his profits.

Universal offers the outrageous claim that:

Turro routinely delivered Jukebox Radio programming to the Ft. Lee translator in violation of Sections 74.531(c) and 74.1231(b) of the Commission’s rules. Two former Jukebox Radio employees stated that the Ft. Lee Translator routinely rebroadcast programming received directly from Turro’s microwave station WMG-499, rather than off the air from WJUX. Tr. 733-36 This evidence is consistent with Turro’s admission that at all times during the period when WGM-499 was in operation, it transmitted the Jukebox Radio audio signal directly to the Ft. Lee Translator (ID ¶¶ 127-128) and with the results of tests conducted by Commission’s field engineer. *See* ID ¶¶ 150-156. The ALJ also erred in finding in favor of Turro on this designated issue as well. (Universal exceptions, p. 17 note 13; see also p. 18)

Judge Steinberg established beyond doubt that Mr. Turro did not program the Fort Lee translator with WMG-499 and that the Fort Lee translator, at all times relevant, received its programming off the air from either WJUX or the Pomona translator, in compliance with the cited Rules. (ID, paras. 126-129, 138-149, 150-154, 175-177, 181-190, 265-291) Universal may as well allege that the Earth is flat.

It is worth noting that the findings on this issue include that on two occasions the Commission’s field engineer made unannounced inspections in 1995 and found through testing that the translator operations were in full compliance with the Commission’s Rules and that independent consulting engineers also observed them to be fully compliant during the same period of time.²³ The testimony of the “two former Jukebox Radio employees” (who were paid

²³The Universal and Bureau “spotlight” arguments cannot apply because these engineering determinations depend upon the scientific laws of physics and radio wave propagation, without regard to whether or not Mr. Turro “knew” he was under investigation, and,

Universal employees during the hearing) was rejected by Judge Steinberg as not credible. (ID, paras. 191-193) Indeed, their testimony was so poor that Universal itself repudiated it.²⁴

Packing this contention into a footnote under an unrelated section is an obvious attempted end-run of the Commission's procedures by Universal, which must be hoping to circumvent the Commission's page limitation and flout the Commission's order denying Universal's request to increase that page limit from twenty-five to forty pages. (Order, FCC 99I-17 (released October 4, 1999)). In addition, it is unconscionable for Universal to repudiate the testimony of its own employees in its proposed findings and then without comment promote that testimony in its Exceptions. These matters abuse the Commission's processes.

Again trying to avoid the effect of the Commission's page limitations by packing extraneous arguments into footnotes, Universal contends that Mr. Turro lacked candor and engaged in affirmative misrepresentations in connection with WMG-499. (Universal Exceptions, p. 18 note 18) Universal is attempting to mislead the Commission and we refer it to the actual findings and conclusions of Judge Steinberg. (ID, paras. 126-133, 198-202, 273-283) The ID amply demonstrates that Mr. Turro was candid at all times and that he did not directly feed programming to the Fort Lee translator, over WGM-499 or by any other means.

V. Conclusion

Universal has failed to challenge any of Judge Steinberg's material findings or conclusions. Instead, Universal relies on misstatements and misreadings of the record and

in fact, the first field engineer inspection was prior to the "spotlight" and the translators were found to be fully compliant then.

²⁴Proposed Findings of Fact and Conclusions of Law of Universal Broadcasting of New York, Inc., dated March 13, 1998, p. 26.

history of this proceeding. Its heavy emphasis on character assassination of Mr. Turro, while steadfastly ignoring the actual record and determinations, must be rejected. The Bureau alleges that there was a transfer of control of WJUX, but its contention is entirely at odds with thorough findings and conclusions of the ID.

Therefore, based on the foregoing, the ID should be affirmed promptly in a final decision of the Commission. Doing so will clear the way for grant of the pending assignment of license application which will allow Mr. Turro to come into compliance with Section 74.1232.

Respectfully submitted,

GERARD A. TURRO

By: *Alan Y. Naftalin (CRU)*
/s/ Alan Y. Naftalin

By: *Charles R. Naftalin*
/s/ Charles R. Naftalin

Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 467-5700

November 15, 1999

His Attorneys

ORIGINAL

RECEIVED

JAN 31 1991

Gerard Turro
111 East California Avenue
Beach Haven, N.J. 08008
January 30, 1991

Federal Communications Commission
Office of the Secretary

The Federal Communications Commission
Mr. Alan Schneider
Auxiliary Services Branch
Washington, D.C. 20036

Dear Mr. Schneider:

The purpose of the letter is to request the Commission for an informal declaratory ruling concerning the operation of commercial FM translators.

In the event a licensee of a commercial FM translator wishes to purchase broadcast airtime on the originating station which is carried on the license's translator may he or she do so?

The following conditions would exist:

1. The translator would be operating outside of the originating stations primary contour.
2. The primary station would not re-imburse the translator licensee for air-time pursuant to the Commission's rules. At no time would the primary station be financially supporting the translator licensee.
3. Any airtime purchased on the primary station by the translator licensee would abide by the Commission's rules regarding purchase of brokered airtime.
4. Advertising may be sold for broadcast during such brokered airtime to support this programming.

It is respectfully requested the Commission expedite a reply to this informal request.

Respectfully submitted,



Gerard Turro

000-66

FCC MAIL SECTION
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Nov 19 4 49 PM '91 19 NOV 1991

2, 1 K COPY

IN REPLY REFER TO:

8930-AJS

Rainer K. Kraus, Esquire
Koteen & Naftalin
1150 Connecticut Avenue
Washington, D.C. 20036

Dear Mr. Kraus:

This refers to your correspondence of January 31, 1991, and the accompanying January 30, 1991 letter of Gerard Turro, licensee of FM translator station W276AQ, Fort Lee, New Jersey. Mr. Turro requests the Commission to provide an informal declaratory ruling regarding the proposed operation of an FM translator station. In particular, Mr. Turro seeks guidance on whether a licensee of a commercial FM translator station can purchase broadcast airtime on the station it is rebroadcasting ("primary station"). The purchase would be under the following circumstances:

1. The translator would be operating outside of the primary contour of the station being rebroadcast;
2. Pursuant to the Commission's Rules, the primary station would not reimburse the translator station licensee for airtime purchased (the primary station would not provide any financial support to the licensee of the translator);
3. The translator station licensee would purchase the airtime through a time brokerage agreement and would meet the Commission's rules and policies on such agreements; and
4. The translator would solicit advertisements to be aired during the brokered time to support the programming presented.

Specifically, the issue presented by Mr. Turro's request is whether the licensee of a translator station is permitted to enter into a time brokerage contractual arrangement with its primary station, provided that the primary station does not either reimburse the translator station licensee for the purchase of the brokered time or provide financial support for the translator station's operation.

In order to rule on Mr. Turro's request we must first determine the effect such a request would have on our newly revised FM translator rules governing financial support by commercial primary stations (47 C.F.R. § 74.1232

000008

Rainer K. Kraus, Esquire

2.

(1990)).¹ Additionally, because airtime for the programming will be purchased through a time brokerage contractual arrangement, we must also give attention to the Commission's Policy Statement on Part-Time Programming, 82 FCC 2d 107 (1980).²

Under § 74.1232(e), an FM translator station whose coverage contour extends beyond the protected contour of the primary station cannot receive any support, before or after construction, either directly or indirectly, from the primary station. This applies to all persons and entities having any interest or connection with the primary station.

With regard to brokerage arrangements between licensees and brokers, such arrangements usually involve the broker as both program producer and commercial salesperson for a time block purchased from the licensee. Our rules only require licensees to keep brokerage contracts at the station and make them available for Commission inspection upon request (47 C.F.R. § 73.3613(d) (1989)).

In view of the specific circumstances presented by Mr. Turro's request, we conclude that his proposed operation would be consistent with the Commission's rules and policies as outlined above. However, this conclusion rests on the following requirements: the time brokerage contract must be kept at the primary station and made available for Commission inspection upon request per § 73.3613(d); there must be a bona fide, arms-length transaction between the primary station and the translator; the licensee of the translator station will have to pay the primary station a rate charge comparable to the amount charged other purchasers of brokered airtime, or an amount consistent with such charges in the local broadcast community; and at no time would the translator station receive financial support, directly or indirectly, from the primary station to cover any costs associated with the operation and maintenance of the translator station.

Accordingly, to the extent indicated above, and in view of the specific circumstances presented, we do not find that Mr. Turro's proposal would be prohibited by the Commission's rules or policies.

Sincerely,

gs *RK*
AJSchneider/RDurham:cj/asb/asd/mbb
typed: 11-15-91
WRE

Roy J. Stewart
Roy J. Stewart, Chief
Mass Media Bureau

000009

¹ See Report and Order In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, MM Docket No. 88-140, 5 FCC Rcd. 2106 (1990).

² See 47 C.F.R. § 73.4267 (1989).



Federal Communications Commission
Washington, D.C. 20554

JUN 05 1996

In reply refer to:

Herbert D. Miller, Jr., Esquire
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue
Washington, D.C. 20036

96060058
8210-AA

Re: W276AQ, Ft. Lee, New Jersey
W232AL, Pomona, New York

Dear Mr. Miller:

This responds to your request of May 30, 1996, to continue the above-captioned FM translator stations' current program service pending action on an application to assign those licenses to Mr. Stephen Gansler, Trustee under the Gerard A. Turro Trust. On April 5, 1996, in response to a complaint filed with respect to the stations' operations, the Chief, Mass Media Bureau afforded the stations' licensee, Gerard A. Turro, a sixty-day period to take whatever action is necessary to bring the stations into compliance with Section 74.1232 of the Commission's Rules, 47 C.F.R. §74.1232. You state that in response to that directive, the application to assign those licenses was filed. Further, you contend that maintenance of the *status quo* with respect to the stations' present operations pending a final decision on the assignment application will permit the public to continue to receive uninterrupted service from the translators in the interim.

We will grant your request to continue the current program service provided by these translator stations, but only until such time as the Commission has had an opportunity to review and evaluate the pending assignment application and trust and related agreements, as well as any comments received thereon. Due to the need to respond expeditiously to your request, we are taking this action on an *ex parte* basis. However, this action is without prejudice to any showing that can or may be made by the complainant in this proceeding.

Accordingly, your request to continue the current program service of the subject FM translator stations **IS GRANTED**, as described herein.

Sincerely,

Edytnz Wise

for Roy J. Stewart
Chief, Mass Media Bureau

cc: Richard A. Helmick, Esquire

CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary in the firm of Koteen & Naftalin, L.L.P., hereby certify that on the 15th day of November, 1999, copies of the foregoing "Reply of Gerard A. Turro to Exceptions" were deposited in the U.S. mail, postage prepaid, or hand delivered where indicated, to the following:

The Honorable Harold Furchtgott-Roth*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W. Room 8-A301
Washington, DC 20554

The Honorable Susan Ness*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W. Room 8-B115
Washington, DC 20554

The Honorable Michael Powell*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W. Room 8-A204
Washington, DC 20554

The Honorable Gloria Tristani*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W. Room 8-C302
Washington, DC 20554

Roy Stewart, Esq.*
Chief, Mass Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W. Room 2-C347
Washington, DC 20554

James W. Shook, Esq.*
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W. Room 3-A460
Washington, DC 20554

Harry F. Cole, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W. Suite 250
Washington, DC 20036
Counsel for Press Broadcasting Company,
Inc.

Roy R. Russo, Esq.
Richard A. Helmick, Esq.
J. Brian Deboice, Esq.
Cohn and Marks
1920 N Street, N.W. Suite 300
Washington, DC 20036

and

Michael D. Hays, Esq.
John S. Logan, Esq.
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, DC 20036
Counsel for Universal Broadcasting of
New York, Inc.

James P. Riley, Esq.
Andrew S. Kersting, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
Counsel for Monticello Mountaintop
Broadcasting, Inc.


Judy Norris